FOR ARGUMENT

No. 88-1916

IN THE

Supreme Court of the United States

October Term, 1989

STATE OF MINNESOTA,

Petitioner,

vs.

ROBERT DARREN OLSON,

Respondent.

ON WRIT OF CERTIORARI TO THE MINNESOTA SUPREME COURT

REPLY BRIEF FOR PETITIONER

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This Reply Brief addresses only a few of the points of disagreement revealed by Respondent's Brief. An absence of discussion of a point in this Brief, therefore, does not signify agreement with Respondent; Petitioner relies on its opening Brief to contradict points not discussed in this Reply Brief.

I. A CAREFUL ANALYSIS OF THE TOTALITY OF THE FACTS AND CIRCUMSTANCES DEMONSTRATES THAT RESPONDENT HAD NO REASONABLE EXPECTATION OF PRIVACY IN THE BERGSTROMS' DUPLEX; SUCH A CONCLUSION CAN BE REACHED WITHOUT OVERTURNING ANY PRIOR DECISIONS OF THIS COURT.

1. Respondent's assertions about the illegal "police attack" on the duplex are not relevant to the "standing" issue before the Court. Whether or not the police conduct in this case was outrageous pertains to the issue of the legality of the arrest and not to the "standing" issue. *See Rawlings v. Kentucky*, 448 U.S. 98, 112 (1980) (Blackmun, J., concurring) ("It remains possible for a defendant to prove that his legitimate interest of privacy was invaded, and yet fail to prove that the police acted illegally in doing so. And it is equally possible for a defendant to prove that the police acted illegally, and yet fail to prove that his own privacy interest was affected.").

2. In arguing that the Bergstrom house was Respondent's residence within the meaning of the Fourth Amendment, Respondent makes several factual errors which, taken together, could mislead this Court if not corrected.[1] First, Respondent did not have "changes of clothes" (Respondent's Brief, p.14) with him at the Bergstroms'; instead, he had at most one change of clothing (R.220). Moreover, it is possible that he did not obtain this clothing until the morning after his overnight stay, when he returned to Ecker's home several hours before his arrest (R.221). Second, Respondent did not receive guests at the Bergstroms' home (Respondent's Brief, p.15). In fact, Respondent did not want his whereabouts known; he admitted that aside from those living in the Bergstrom home, only one of his friends knew he was staying there (R.225-26). Third, Respondent's claim that he had no other place to stay (Respondent's Brief, p.15) ignores the fact that his home for at least ten days before the crime was at Ecker's apartment; presumably all of Respondent's possessions were still there (R.220-21). Fourth, although Respondent testified he intended to stay with the Bergstroms indefinitely, Julie Bergstrom testified that Respondent asked to stay only for "a couple days" (R.194-95). Fifth, Respondent stated he had permission to stay indefinitely; yet Louanne Bergstrom testified only that Respondent could stay until she asked him to leave (R.198). Finally, Respondent's statement that he was "temporarily residing" in the Bergstrom home (Respondent's Brief, p.9) conflicts, not only with the essential facts of the case (*see* Petitioner's Brief, pp.6-7, 16), but also conflicts with the understanding possessed by the owners of the home:

> Q. [by prosecutor]: Ms. Bergstrom, counsel just said that Mr. Olson was living there. Was he living there?
>
> A. [by LouAnne Bergstrom]: No, he wasn't living there. He stayed there one night.
>
> Q. So he was just a guest overnight?
>
> A. Right.

(R.189).

[1] Petitioner refers this Court to Petitioner's Brief, pp.6-7, 16 for a concise and accurate statement of the relevant facts.

3. Respondent's Brief, largely a refutation of arguments which Petitioner did not make, is an apparent attempt to distract this Court from the arguments actually set forth in Petitioner's Brief. Petitioner does not argue, as Respondent claims, that property rights are the sole determinants of privacy rights; or that *complete* control and dominion over a dwelling coupled with the right to exclude *all* others is necessary to create a legitimate expectation of privacy (Respondent's Brief, pp.17-21). Rather, Petitioner specifically acknowledges at pp.19-21 of its Brief that one can have a privacy interest in a place other than one's own home, and suggests that property rights and the right to exclude others are only two of twelve possible factors to consider in determining privacy rights.

Nor is it necessary, as Respondent argues at pp.21-23 of his Brief, that *Jones v. United States*, 362 U.S. 257 (1960) be overturned in order to reverse the Minnesota Supreme Court in this case; Petitioner has not asked this Court to do so. This case is readily distinguishable from *Jones* in that Jones, unlike Olson, possessed a key to his friend's apartment; had the right to exclude others; and had exclusive use of the apartment because the owner allowed Jones to remain while he was absent. This combination of factors led the Court to decide that Jones had a legitimate expectation of privacy in his friend's apartment;[2] the absence of these factors, or any of the other twelve factors suggested by Petitioner, compels the opposite result in the instant case.

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[2] Petitioner agrees with Respondent that possession of a key is only one factor to be considered (*see* pp.18 and 21 of Petitioner's Brief).

4. Respondent's criticisms of Petitioner's twelve-part "totality of the circumstances" test are unfounded. Respondent chooses to apply Petitioner's suggested factors mechanistically and then argues the test is "mechanical." As Petitioner states in its Brief at p.21, the factors are not to be considered in isolation; the ultimate question remains whether one's claim to privacy from government intrusion is reasonable in light of *all* the surrounding circumstances. The twelve factors represent a flexible way to make a case by case analysis of the facts relevant to privacy expectations.

It is wrong to claim, as Respondent does in his Brief at pp.23-26, that the factors do not "favor guests of any duration" and therefore represent a "hidden attack on *Jones v. United States*." In fact, this Court found that Jones possessed a privacy expectation in his friend's apartment because of the presence of four of Petitioner's suggested factors: (d), (i), (j) and (k). *See* Petitioner's Brief, p.21. Other factors, such as (b), (g), (h) or (l), also do not necessarily preclude guests from having privacy interests. Significantly, none of the twelve factors were present in the instant case.[3]

It is true, as Respondent asserts, that police officers may not have sufficient information to analyze the twelve factors suggested by Petitioner in order to decide questions of privacy rights. Petitioner submits, however, that determinations of privacy interests should be decided by courts, which possess all the relevant facts, and not by policemen in the field. Police adherence to the Fourth Amendment is required whether or not the person(s) targeted by police have "standing" to object

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[3] Nor do the factors suggested by Respondent (Respondent's Brief, pp.28-29) significantly aid him. Of the four factors, only the first one, legitimate presence, favors Respondent.

to constitutional violations. Society's interest in privacy rights is better served by confining the policeman's role to determining questions such as the existence of probable cause and exigent circumstances, questions which the policeman is required to answer carefully in order to act legally. Later, when all the facts are gathered, a judicial determination can be made concerning the scope of the policeman's action.

II. RESPONDENT'S WARRANTLESS ARREST WAS REASONABLE UNDER THE FOURTH AMENDMENT BECAUSE IT WAS JUSTIFIED BY EXIGENT CIRCUMSTANCES.

1. Reversal of the Minnesota Supreme Court's decision will not "emasculate" *Payton v. New York*. *Payton v. New York*, 455 U.S. 573 (1980) stands for the proposition that warrantless searches and seizures within the home are presumptively unreasonable in the absence of exigent circumstances. *Payton* does not define exigent circumstances because the issue was not properly before the Court; Respondent's attempts to use the case to support his position, (Respondent's Brief, pp.36, 40-41), therefore, are misplaced.[4] Where, as

[4] "The Court of Appeals majority treated both Payton's and Riddick's cases as involving routine arrests in which there was ample time to obtain a warrant, and we will do the same. Accordingly, we have no occasion to consider the sort of emergency or dangerous situation, described in our cases as 'exigent circumstances,' that would justify a warrantless entry into a home for the purpose of either arrest or search." 445 U.S. at 583. The facts of *Payton* cannot, therefore, be interpreted to define the parameters of a routine arrest, especially since this Court suggested that the opposite might be true: ". . . it is arguable that the warrantless entry to effect Payton's arrest might have been justified by exigent circumstances." *Id.*

in this case, police have probable cause to believe that a suspect committed a violent felony; have reason to believe he may be armed (*see* Petitioner's Brief, p.26); have probable cause as to the suspect's location; know that the suspect has escaped from police once and have information that he is preparing to flee again;[5] and know that the suspect is aware that the police are after him;[6] police must act quickly to prevent the suspect's escape and the endangerment of police officers and others. Such a holding of exigent circumstances does not undermine *Payton*.

2. In citing testimony specifically rejected by the trial court at the pretrial hearing, Respondent fails to apply the proper limited standard of review of factual findings on appeal. Respondent supports his legal arguments with Officer Von Lehe's testimony concerning police verification of the tip as to Respondent's location (Respondent's Brief, p.4, n.5, 42-43). Von Lehe's testimony, however, was contradicted by the testimony of Sergeant DeConcini and that of Von Lehe's partner, Officer Adamaz (R.149-50). The trial court rejected Von Lehe's testimony and accepted the testimony of the other two officers, specifically finding that Sergeant DeConcini sent

[5] The police took this tip seriously enough to stake out the bus depot the morning of Respondent's arrest (R.129); that Respondent had not yet left town does not make the tip "unfounded."

[6] Respondent's assertion that he was unaware he was sought by police is incredible, in light of the following facts: a) Respondent narrowly escaped from a police chase; b) Respondent was aware of Ecker's arrest; and c) Respondent was aware that his car had been impounded and searched. Under these circumstances; it cannot be said that the police created the exigency by alerting him to their presence.

police officers to the duplex to verify the tip before later sending them to arrest Respondent (J.A.5, 10). Similarly, Respondent relies on Julie Bergstrom's testimony about Sergeant DeConcini's telephone call into the duplex shortly before his arrest (Respondent's Brief, pp.37-38). The trial court, however, specifically rejected Julie Bergstrom's testimony about the conversation and instead accepted Sergeant DeConcini's testimony (J.A.5-6, 12). These factual findings made by the trial court at the pretrial suppression hearing must be accepted on appeal unless they are clearly erroneous. *Campbell v. United States*, 373 U.S. 487, 493 (1963). *See also Ker v. California*, 374 U.S. 23, 34 (1963) (It is not the function of the Supreme Court to appraise contradictory factual questions decided by state trial courts in assessing Fourth Amendment claims).

3. Respondent underestimates the time necessary to obtain an arrest warrant and exaggerates the importance of the question. As Petitioner explained in its Brief at pp.27-28, more time is needed to obtain an arrest warrant than a search warrant because a county attorney must review the police reports, decide whether to issue the complaint, dictate the complaint, arrange for a secretary to type the document, have it approved by a judge and then file it. A warrant could not have been obtained quickly on a Sunday, certainly not in the 45 minutes before Respondent returned to the duplex.

Moreover, Petitioner submits that whether exigent circumstances exist should not in most cases depend on the time required to obtain a warant: more important is the dangerousness of the suspect and the likelihood of his escape. Sergeant

DeConcini did not obtain an arrest warrant because he believed that he was faced with an emergency requiring Respondent's immediate arrest. Respondent's assertion, therefore, that Sergeant DeConcini "did not wish to disturb prosecutors during their vacation time" (Respondent's Brief pp.5, 30, 36) is not supported by the record.[7]

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[7] The sole references in the record to DeConcini's decision not to seek a warrant are contained at R.129-30 (quoted in Petitioner's Brief at p.27, n.15, and Respondent's Brief, pp.35-36) and at R.116:

Q. [by prosecutor]: . . . it's an arrest bulletin, right?
A. [by Sgt. DeConcini]: Yes, this is an arrest bulletin.
Q. Now, this was on the 19th, right, is that on a Sunday?
A. Yes.
Q. To your knowledge were any County Attorneys available for charging that day?
A. No.
Q. At least in the office?
A. At least in the office, no.

CONCLUSION

For the foregoing reasons and those stated in Petitioner's opening brief, the judgment of the Minnesota Supreme Court should be reversed.

Respectfully submitted,

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January, 1990